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for the consideration of evidence, including DNA test results, to be used in the determination of applicants' blood quantum and order Defendants to qualify Plaintiff Leighton Niakala Pang Kee ("Plaintiff") as a beneficiary of the Hawaiian Homelands Trust as he has provided sufficient evidence to meet the statutory requirement for proving eligibility as a native Hawaiian.

JURISDICTION

1. This is a civil action which arises Article XII, §§ 1, 2 and 3 of the Hawai'i State Constitution and the HHCA.

2. This Court has jurisdiction over the claims for relief in this action pursuant to Hawai'i Revised Statutes (HRS) §§ 632-1, 603-21.5(a)(3), 603-21.9, and 661-1.

PARTIES

3. Plaintiff is and, at all times mentioned herein, has been a citizen of the United States, and a resident of the State of Hawai'i.

4. Defendant Jobie Masagatani is the Chairperson of the Hawaiian Homes Commission and the Director of the DHHL.

5. Defendant Hawaiian Homes Commission ("HHC") is the governing entity ultimately responsible for the implementation of the Hawaiian Homes Commission Act of 1920 ("HHCA") and its members are ultimately responsible for the approval of an applicant's qualification as an eligible lessee of a homestead parcel under Section 207 and 208 of the HHCA.

6. Defendant DHHL is a state agency overseen by the HHC, which is responsible for daily administration of Hawaiian Homestead leases under the HHCA.

FACTUAL ALLEGATIONS

7. Sometime in early 1960, Ms. Florence Kanani Silva ("Ms. Silva") met Mr. Earick Kukonu, Sr. ("Mr. Kukonu") while she was living near him in Kalihi, O'ahu, Hawai'i.

8. A brief sexual relationship between Ms. Silva and Mr. Kukonu resulted in the conception and birth of Plaintiff.

9. Plaintiff was born in Honolulu, O'ahu, Hawai'i on December 30, 1960, under the name of Eric Sonny Niakala Silva.

10. Plaintiff's original birth certificate from the Department of Health identifies his natural mother as Florence Kanani Silva but does not state the name, race, age, birthplace or occupation of his father, Mr. Kukonu.

11. Ms. Silva was born on September 7, 1943 in Honolulu, O'ahu, Hawai'i.

12. Although she was subsequently adopted, a letter dated October 17, 2006, from the First Circuit Court indicates that Ms. Silva's biological mother was part-Hawaiian and her father was Hawaiian.

13. Ms. Silva is of no less than 81.25% Hawaiian ancestry.

14. Mr. Kukonu was born in Honolulu, O'ahu, Hawai'i, on July 6, 1941.

15. Mr. Kukonu's birth certificate, which is on file with the Department of Health and registered as number 151 1941-000686, states that both his mother, Hannah Momi Needham, and his father, Gabriel Lani Kukonu, were native Hawaiian.

16. On February 14, 1964, Anthony Pang Kee legally adopted Plaintiff.

17. After Plaintiff's adoption, Plaintiff's original birth certificate was sealed. An amended birth certificate is on file with the Department of Health and identified as birth certificate number 151 60 16641, the same number as the original.

18. Plaintiff's natural father, Mr. Kukonu, died on April 28, 1983 in Honolulu, O'ahu, Hawai'i. His death certificate is on file with the Department of Health and identified as death certificate number 151 1964.

19. Mr. Kukonu was survived by two full biological brothers, including Rodney William Kukonu ("Rodney Kukonu").

20. Rodney Kukonu qualified for Hawaiian Home Lands benefits and is currently a lessee on a Hawaiian Home Lands homestead in Nānākuli, O'ahu. He is also at least 50% Hawaiian ancestry.

21. On or about March 31, 2000, Plaintiff applied to the Defendant Department of Hawaiian Home Lands (DHHL) for a homestead lease.

22. In a letter dated May 23, 2000, DHHL notified Plaintiff that it was returning his application because his birth certificate indicated that it was amended and not the original.

23. In a letter dated October 9, 2000, Defendant DHHL informed Plaintiff that it was unable to verify his blood quantum at 50% and that it had determined that he was ineligible for Hawaiian Home Lands benefits.

24. In 2001, Plaintiff, in an attempt to amend his returned application, requested his adoption records from the Family Court and was informed that there was no information in his record regarding the ancestry of his birth father.

25. Plaintiff subsequently learned that his natural father's full biological brother, Rodney Kukonu, lived in Nanakuli, O'ahu, Hawai'i.

26. Rodney Kukonu recalled the circumstances of Plaintiff's childhood and was familiar with Plaintiff's relation to his late brother, Earick Kukonu, Sr., so he agreed to assist Plaintiff in avuncular DNA testing to establish the certainty of their kinship.

27. On or about June 10, 2009, Rodney Kukonu met Plaintiff at the office of Dr. George E. Raquel in Waipahu, O'ahu, Hawai'i, to provide the requisite samples for a DNA kinship test.

28. Dr. Raquel first confirmed both Rodney Kukonu and the Plaintiff's identities and photocopied their respective drivers' licenses for his records.

29. After taking Rodney Kukonu's and Plaintiff's DNA samples, Dr. Raquel sealed and sent them, via Federal Express two day delivery, to Chromosomal Laboratories, Inc. a nationally accredited DNA testing company, located in Phoenix, Arizona.

30. On or about June 15, 2009, after Plaintiff and Mr. Kukonu's DNA samples were tested, Chromosomal Labs issued an Avuncular Report-Legal Test, signed by Dr. Vince Miller, Ph.D., which indicated that the probability of Mr. Kukonu's relationship as an Uncle to Plaintiff was 96.35%.

31. In March 2012, Plaintiff again applied to the DHHL for a Hawai'i Islandwide Residential Lot Lease and a Hawai'i Islandwide Agricultural Lot Lease.

32. In support of his applications, Plaintiff submitted the positive DNA test results with his uncle Rodney William Kukonu along with other relevant vital records and an affidavit of a cousin who attested to the circumstances of his birth and explained that she and her family knew that Mr. Kukonu was Plaintiff's natural father.

33. On or about May 2, 2012, the DHHL responded, acknowledging its March 28, 2012, receipt of the application and communicating its denial of Plaintiff's application.

34. The DHHL cited the following reason for denying Plaintiff's application:

The Department has not made the decision whether to accept DNA test results as evidence of Hawaiian ancestry, much less the degree of certainty the Department will accept as proof of Hawaiian ancestry through DNA testing, nor does the

Department possess the expertise necessary to interpret and evaluate DNA test results. Therefore, at the present time we are unable to use your test results to determine whether you have the requisite Hawaiian ancestry to qualify for Department benefits.

35. The DHHL additionally informed Plaintiff that his recourse was to address the Hawaiian Homes Commission (HHC).

36. On May 22, 2012, Plaintiff, through his attorneys, formally requested to appear before the HHC at its next regularly scheduled meeting pursuant to Hawai'i Administrative Rules (HAR) § 10-3-3(b).

37. On or about June 8, 2012, the Chairman Designate Jobie Masagatani sent Plaintiff a letter approving Plaintiff's request.

38. On June 18, 2012, Plaintiff's attorneys appeared before the HHC on his behalf, asking that the HHC (1) reconsider the DHHL's arbitrary denial of Mr. Pang Kee's application for a Hawaiian Home Lands lease based on its refusal to adopt a rule or interpret an existing rule justifying the acceptability of DNA as evidence to prove the requisite blood quantum for a Hawaiian Home Lands lease and (2) set a clear policy accepting DNA test results as a means to prove that an applicant is qualified pursuant to the statute.

39. To date, the HHC has taken no action regarding Plaintiff's requests.

40. Plaintiff desires to have the DHHL accept this DNA evidence as proof of the identity of his natural father and, ultimately, as proof of his Hawaiian ancestry for purposes of eligibility for Hawaiian Home Lands benefits.

COUNT 1

(VIOLATION OF HAWAIIAN HOMES COMMISSION ACT SECTION 222)

41. Plaintiff hereby realleges and incorporates by reference all the above allegations.

42. The Hawaiian Homes Commission Act (HHCA) § 222 states that "[t]he department . . . shall adopt rules in accordance with chapter 91, Hawaii Revised Statutes, as are necessary for the efficient execution of the functions vested in the department by this Act." (Emphasis added).

43. HRS § 91-2 provides in relevant part that:

(a) In addition to other rulemaking requirements imposed by law, each agency shall:

(1) Adopt as a rule a description of the methods whereby the public may obtain information or make submittals or requests.

(3) Make available for public inspection all rules and written statements of policy or interpretation formulated, adopted, or used by the agency in the discharge of its functions.

(b) No agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required, except where a person has actual knowledge thereof.

44. Indeed, rules regarding the standard for the requisite scientific evidence in support of any homestead application are necessary in order for applicants to prove they are qualified for HHCA benefits.

45. Regarding qualifications of applicants, Hawai'i Administrative Rules (HAR) § 10-3-2 currently provides:

(a) Applicants for residential, agricultural, or pastoral lot leases shall provide the department with documented proof that the applicant is:

- (1) At least eighteen years of age; and
- (2) A native Hawaiian.

(b) In addition to the qualifications required in subsection (a), a person applying for an agricultural or pastoral lease may be required to comply with section 10-3-24 before a lease award for an agricultural or pastoral lot can be made.

(Emphasis added).

46. The rules are silent as to what type of evidence constitutes the requisite "documented proof" that the applicant is a native Hawaiian.

47. Defendant Department accepts vital records as proof of Hawaiian ancestry, without any explicit standard for accepting such documentation as evidence of homestead eligibility.

48. However, gaps in vital records, like the absence of any explicit identification of paternity, require that other types of evidence must be accepted for this critical determination.

49. Because Defendant Department must adopt rules "necessary for the efficient execution of the functions vested in the department by th[e HHCA]," it must adopt rules on what types of evidence applicants could submit to supplement vital records when there are such gaps. *Cf. Aluli v. Lewin*, 73 Haw. 56, 60, 828 P.2d 802, 804 (1992) (where appellants contended that the Department of Health erred in issuing a permit when there were no rules promulgated in

accordance with HRS Chapter 91 governing the issuance of such permits, the Court held that “fairness to the public and potential applicants . . . dictates that the rules adopted by DOH be known beforehand”).

50. In order to avoid arbitrary actions and invalid or ineffective eligibility determinations, Defendant HHC – as trustees of the Hawaiian Home Lands trust – must require that Defendant Department adopt rules related to the specific documentation acceptable, including the standards of DNA testing, to substantiate eligibility for receipt of a homestead lease pursuant to HHCA § 222.

COUNT 2

(VIOLATION OF COMMON LAW BREACH OF TRUST OR FIDUCIARY DUTY)

51. Plaintiff hereby realleges and incorporates by reference all the above allegations.

52. Pursuant to the Hawaiian Homes Commission Act (HHCA), the State owes “a high duty of care” to Native Hawaiians. *See Ahuna v. DHHL*, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982).

53. Defendant HHC is, essentially, a group of trustees of the Hawaiian Home Lands trust, and under trust principles applicable to all trustees, Defendant HHC must fulfill its trust duties to Native Hawaiians. *Kalima v. State*, 111 Hawai`i 84, 87-88, 137 P.3d 990, 993-94 (2006) (“The HHCA, together with the Hawai`i Admission Act, impose upon the State the duties and obligations of trustee to oversee the operations carried out under the authority of the HHCA.”).

54. All trustees owe a duty to carry out the trust in accordance with the terms of the trust as well as a duty to act in good faith in the administration of the trust, which requires, among other things, that they act with undivided loyalty to the trust and to the interests of the beneficiary.

55. Defendants owe their beneficiaries this duty of good faith and loyalty and must, therefore, diligently act to implement the explicit terms of the trust.

56. Section 101 of the HHCA establishes that two of the principal purposes of the Act are:

(1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;

(2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors[.]

57. In other words, Defendants must place Native Hawaiians on the land "in a prompt and efficient manner" -- not erect or create additional insurmountable obstacles for them to get on the land.

58. By failing to promulgate rules pursuant to HHCA § 222, Defendants have failed to give proper notice as to what does and does not constitute proper evidence to qualify for Hawaiian Home Lands benefits.

59. As a result, potential beneficiaries have the unconscionable burden of guessing which types of evidence will be accepted by the Department once Defendant DHHL rejects their applications on the basis of insufficient evidence.

60. This guessing game is not the responsibility of potential beneficiaries who would otherwise be qualified under the HHCA; rather, it is the duty of Defendants to ensure that the beneficiaries' best interests are met, which includes providing them guidance as to what they need to submit as part of their applications.

61. Indeed, the HHCA requires that Defendant Department adopt rules "as are necessary for the efficient execution of the functions vested in the department by th[e HHCA]." HHCA § 222.

62. By failing to require that Defendant Department adopt such rules, Defendant HHC has breached its fiduciary duties to its beneficiaries to implement the terms of the trust.

63. Under Haw. Const. Art. 12, § 1, the State is mandated to provide Defendant DHHL "sufficient" funds to pay for its operating and administrative expenses, which includes, amongst other things, the required resources and expertise to "interpret and evaluate DNA test results."

64. By failing to seek the resources to obtain the expertise needed to evaluate DNA evidence in a timely and efficient matter, Defendants have violated their trust duty.

COUNT 3
(VIOLATION OF CONSTITUTIONAL DUE PROCESS)

65. Plaintiff hereby realleges and incorporates by reference all the above allegations.

66. Under Haw. Const. Art. 1, § 5, the Defendants, as public officials, may not deprive Plaintiff as a trust beneficiary of a property right without due process of law.

67. Due process requires a public official to make clear the basis of any rules he/she is implementing that affect the ability of a beneficiary of the HHCA public trust to qualify for the benefits provided under that Act.

68. By failing to articulate the basis for refusing to accept scientifically justified proof of the eligibility of Plaintiff for a homestead lease under the HHCA, Defendants are violating the due process clause of the State Constitution.

69. Therefore, Plaintiff is entitled to a declaratory judgment that Defendants have violated his due process rights to a clear set of standards for what proof is acceptable, or to a reasoned articulation of why DNA evidence is not acceptable, to establish his qualification for a Hawaiian homestead lease under the HHCA.

COUNT 4

(VIOLATION OF RIGHT TO QUALIFY FOR HAWAIIAN HOMESTEAD LEASE)

70. Plaintiff hereby realleges and incorporates by reference all the above allegations.

71. Pursuant to section 207 of the HHCA and HAR § 10-3-2, anyone who is 50% or more Hawaiian blood and at least 18 years of age qualifies for a homestead lease of available lands under the HHCA.

72. By reason of Defendant DHHL's arbitrary rejection of Plaintiff's DNA proof of Hawaiian ancestry, the issue whether Mr. Kukonu is Plaintiff's natural father constitutes an actual ongoing controversy between Plaintiff and Defendant, within the meaning of Chapter 632, HRS, the Declaratory Judgment Act, as quoted above, over whether Plaintiff qualifies for a homestead lease under Section 207 of the HHCA.

73. Pursuant to HRS Chapter 584, the Hawai'i Uniform Parentage Act (UPA), the statutory period to file a court action for the determination of a father and child relationship is three years from the petitioner attaining the age of majority.

74. Because more than three years have passed since Plaintiff reached the age of majority, he cannot invoke the provisions of the UPA to seek the relief he desires, which would correct the key vital statistic record that is the obstacle to his qualification for a homestead lease under the HHCA.

75. Pursuant to HAR § 10-3-3(b), "[a]n applicant who disagrees with any action taken by the department shall have thirty days from receipt of written notice of such action within which to petition the department for appearance before the next regular meeting of the commission concerning the action taken on the application."

76. Following Defendants' denial of his application for a homestead lease, Plaintiff duly addressed the Commission at its next regular meeting.

77. The Commission took no action at that meeting and has continued to definitely forgo resolution of this important issue on qualifying beneficiaries.

78. Consequently, Plaintiff has no other remedy to removing the obstacle now preventing him from qualifying for the Hawaiian homestead lease under Section 207 of the HHCA and, therefore, remains in a perpetual state of uncertainty as to whether he is qualified.

79. Accordingly, Plaintiff is entitled to a judgment pursuant to HRS Chapter 632 declaring that: (a) the results of an avuncular DNA test confirms his genealogical relationship to his natural uncle Rodney Kukonu and, (b) because this evidence confirms anecdotal evidence of his paternal relationship to Rodney Kukonu's biological brother, Mr. Earick Kukonu, Sr., there is clear and convincing evidence to establish his Hawaiian ancestry as a direct grandchild of Hannah Momi Needham and Gabriel Lani Kukonu and as the naturally born child of Ms. Florence Kanani Silva and Mr. Earick Kukonu, Sr.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court issue an order:

- A. Declaring that Defendants have violated Section 222 of the HHCA, their common law trust duty with beneficiaries, like Plaintiff, and Plaintiff's due process rights as a result of its refusal to establish, through rule-making, the standards of proof required for qualification by applicants for Hawaiian homestead leases under Section 207 of the HHCA, including the acceptability of DNA and other documentary evidence in support of any application for such leases;
- B. Declaring that Plaintiff has an absolute right to obtain a timely determination of his qualification for a Hawaiian homestead lease under Section 207 of the HHCA, and HAR. §10-3-2, based on the standard of

the scientific proof, including DNA test results, and other evidence necessary to establish his qualification for such a lease;

- C. Declaring that Plaintiff's natural father is Earick Kukonu, Sr., which establishes that Plaintiff had the requisite blood quantum to qualify for a Hawaiian homestead lease under Section 207 of the HHCA;
- D. Compelling Defendants to adopt more specific rules on what types of evidence applicants for Hawaiian Home Lands leases must provide to qualify for Hawaiian Home Lands benefits; and
- E. For such further relief as this Court deems appropriate.

DATED: Honolulu, Hawai'i, September 24, 2012.



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